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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-207

JOSEPH G. SZIMA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

In January 1972, the State conducted Court authorized wiretaps of conversations between petitioner and other persons. The conversations indicated that petitioner was

involved in illegal bookmaking and other gambling activities. Petitioner was arrested on February 4, 1972, after a search executed pursuant to a warrant revealed that he was also in possession of gambling paraphernalia at his home.

Thereafter, on February 11, 1972, petitioner waived his right to a preliminary hearing. On December 5, 1973, the New Jersey State Grand Jury returned a four count indictment charging petitioner with: (1) bookmaking, in violation of *N. J. Stat. Ann.* §2A:112-3; (2) working for an illegal lottery, in violation of *N. J. Stat. Ann.* §2A:121-3(a); (3) possession of lottery paraphernalia, in violation of *N. J. Stat. Ann.* §2A:121-3(b); and (4) maintaining a lottery on his premises, in violation of *N. J. Stat. Ann.* §2A:121-3(c).

Petitioner moved for dismissal of the indictment on April 19, 1974. At the hearing petitioner contended that the time between arrest and indictment was sufficient to trigger a speedy trial claim and that the indictment should be dismissed since the State had failed to offer an explanation for the 23-month period. Although petitioner conceded that he had suffered no prejudice as a result of the time period involved and, also, that he had made no attempts to bring the matter to a speedy disposition, he, nevertheless, contended that his rights under the Federal Sixth Amendment had been infringed.

The State acknowledged the fact that it had no reasons that would justify the time lapse. The delay was the result of inadvertence on the part of State officials who were responsible for presenting the matter to a grand jury. The State conceded that although there was a huge backlog of cases awaiting grand jury action, priorities based upon the date of arrest should have been assigned. Nevertheless the prosecutor's failure to establish such priorities

was not designed to impair the rights of the accused. Further, the State argued that the time lapse did not rise to the level of a speedy trial violation under the balancing test enunciated in *Barker* v. *Wingo,* 407 U.S. 514 (1972). Additionally, the State adduced facts demonstrating that petitioner did not suffer any prejudice. The waiver of a preliminary hearing and petitioner's inaction regarding his right to a speedy trial were indicia of his lack of prejudice. The court then denied petitioner's motion.

On June 24, 1974, petitioner was tried and convicted on Counts I, II and IV. At trial, defense counsel conceded that in effect, petitioner admitted his guilt on the charges. He noted that he was proceeding with the formalities of trial solely to preserve his right to appeal. In order to expedite matters, petitioner waived his right to a jury and stipulated the admissibility and propriety of the State's evidence. That evidence consisted of tapes of the wiretaps and the gambling paraphernalia. Suffice it to say, the State's proofs were overwhelming. As noted, the court convicted petitioner of three counts and acquitted him on one.

On July 26, 1974, the Honorable Thomas S. O'Brien, J.S.C., sentenced petitioner to three concurrent terms of from one year to fifteen months in New Jersey State Prison. The court agreed with both parties that petitioner should be treated as though he had pleaded guilty, for sentencing purposes, since his *pro forma* trial transpired solely to protect his speedy trial rights.

On April 22, 1975, the Superior Court of New Jersey, Appellate Division reversed petitioner's conviction, ruling that his federal right to a speedy trial had been denied. *State* v. *Szima,* 133 N.J. Super. 469, 337 A.2d 393 (App. Div. 1975) (per curiam).

The Supreme Court of New Jersey then granted the State's petition for discretionary review. 68 N.J. 170, 343 A.2d 457. On May 17, 1976, the court reversed, reinstating the judgment of conviction. 70 N.J. 196, 358 A.2d 773. The court essentially held that the Appellate Division misapplied the test of *Barker* v. *Wingo, supra.*

Thereafter, petitioner received a stay of execution from the New Jersey Supreme Court which expired on or about August 11, 1976. Stays pending action on the instant petition were denied by Mr. Justice Brennan and Mr. Justice Marshall.

REASONS FOR DENYING CERTIORARI

The Supreme Court of New Jersey decided the instant matter fully in accord with well-settled principles established by this Court; and, therefore, no reason exists for a grant of certiorari.

Petitioner's sole claim is that the Supreme Court of New Jersey incorrectly judged this case's facts within the framework of *Barker* v. *Wingo, supra.* Briefly, *Barker* rejected the concept that the federal right to a speedy trial could be reduced to a *per se* formula. Four basic criteria were posited instead. The length, reason for, prejudicial effect of delay, and the defendant's assertion of his right to a speedy trial were said to create a framework within which a balance must always be struck. *Barker* v. *Wingo, supra,* 407 U.S. at 530-33. This Court also noted that other circumstances might of need be part of the equation. *Id.* at 533.[1] *Barker,* though, did more

[1] This Court did not explain what those circumstances might be. Conceded guilt, however, was accepted as one such circumstance by a federal Court of Appeals. See *United States* v. *Lockett,* 526 F.2d 1110, 1111-12 (7th Cir. 1975). If conceded guilt is a relevant consideration, then petitioner's current claim is asserted from a position of weakness; he has conceded his guilt throughout these proceedings.

than merely establish the relevant analytical mode. In discussing the various factors, this Court provided necessary guidance for evaluation of speedy trial claims.

The length of delay, according to *Barker,* "is to some extent a triggering mechanism." *Id.* at 530. The delay must be "presumptively prejudicial", else "there is no necessity for inquiry into the other factors that go into the balance." *Id.* *Barker* noted that the time lapse in each case must be viewed in its own "peculiar circumstances." *Id.* at 530-31.

The reason for delay was the next factor noted. *Barker* framed this as "the reason the government assigns to justify the delay." *Id.* at 531. The Court delineated three distinct categories of reason for delay. First, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." *Id.* Accord, *e.g., United States* v. *Marion,* 404 U.S. 307, 325 (1971). However, the Court noted a second consideration that, "[a] more neutral reason such as negligence should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." 407 U.S. at 531. Last, a valid reason for delay, such as unavailable witness, serves to justify appropriate delay. *Id.*

The third balancing criterion is whether or not a defendant asserts his right. Even so, it must be remembered that this Court declared unconstitutional demand-waiver rules. *Id.* at 528-529. Thus, the failure to move for a speedy trial is not dispositive by itself. Nonetheless, a defendant's assertion of right was said to be "closely related" to the other criteria. *Id.* Specifically, the strength of a defendant's efforts to assert his right to a speedy trial "will be affected by the length of the delay, to some

extent by the reason for the delay, and most particularly, by the personal prejudice, which is not always readily identifiable, that he experiences." *Id.* Realistically, "[t]he more serious the deprivation, the more likely a defendant is to complain." *Id.* at 531. For that reason, the fact of the assertion *vel non* is important in determining the deprivation of right. *Id.* This Court felt compelled explicitly to "emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 531-32.

The fourth criterion isolated in *Barker* is prejudice to the defendant. The Court identified three forms of prejudice to defendants which flow from delays in disposition of pending charges. Pretrial incarceration, anxiety to the accused and the impairment of the defense are all to be evaluated in judging a speedy trial claim. *Id.* at 531-32. See, *e.g., Smith* v. *Hooey,* 393 U.S. 374, 377-78 (1969); *Klopfer* v. *North Carolina,* 386 U.S. 213, 221-22 (1967). See also *Moore* v. *Arizona,* 414 U.S. 25 (1973). Of these, however, impairment of the defense was, obviously, the most serious "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker* v. *Wingo, supra,* 407 U.S. at 532.

In concluding its analysis, this Court observed that it considered "none of the four factors identified above as either a necessary or sufficient condition to the findings of a deprivation of the right of a speedy trial." *Id.* at 532. No single factor has "talismanic qualities". *Id.* Rather, "courts must still engage in a difficult and sensitive balancing process." *Id.* at 533.

It is, therefore, against the backdrop of the *Barker* v. *Wingo* balance that the New Jersey Supreme Court's decision must be judged. The New Jersey court meticulously examined petitioner's claim with heavy reliance on *Barker.* First, there has been no dispute that the 23-month delay between arrest and indictment of need triggered *Barker* analysis; and, the court so held, relying on *Dillingham* v. *United States,* 423 U.S. 64 (1975). *State* v. *Szima, supra,* 70 N.J. at 202, 358 A.2d at 776.

As to the reason for delay, the court simply wrote that "[i]t should not have happened." *Id.* at 358 A.2d at 777. Respondent has never sought to excuse its delay and has admitted that the delay was the result of an inadvertent oversight by members of the New Jersey Attorney General's Office. The New Jersey Supreme Court, however, did not chastise respondent for this oversight. By implication, then, the court correctly deemed this negligence to be a "more neutral reason" within the *Barker* context. As noted, the delay resulted from a huge backlog of complex and important cases awaiting grand jury action and a concomitant oversight in assignment of priorities to those cases. In no way did respondent attempt purposely to impair petitioner's defense.

Likewise, the court found that petitioner had failed to assert his rights. 70 N.J. at 202, 358 A.2d at 776. Although petitioner contended, and the Appellate Division agreed, that he could not have asked to be indicted, the Supreme Court found that other viable mechanisms to assert speedy trial rights were present in New Jersey procedures. Compare 70 N.J. at 202, 358 A.2d at 776, with 133 N.J. Super. at 473, 337 A.2d at 395. Specifically, the supreme court found that petitioner could have utilized *New Jersey Court Rule* 3:25-3 to move for dismissal of the complaint. *Id.* The court, therefore, held that petitioner could have asserted his right to a speedy trial by moving for dismissal but did not. *Id.*

Finally, and of utmost importance, the court found that petitioner was in no way prejudiced by the delay. He

"was not subjected to lengthy pretrial incarceration." 70 N.J. at 202, 358 A.2d at 776. In fact, petitioner was never incarcerated until post-decision stays granted by the New Jersey Supreme Court expired. Also, petitioner "claim[ed] no impairment of his ability to defend." *Id.* at 202, 358 A.2d at 777. In fact, the sole intimation of prejudice here is petitioner's contention that the New Jersey court "completely failed to take into consideration the inherent prejudice an accused encounters." (Pb11). Additionally, he cites language from one of the dissents below which notes petitioner's personal situation and then uncritically assumes that his "vulnerability to prejudice is apparent." (Pb12). Nevertheless, petitioner has never demonstrated that he has, in any way, been prejudiced, nor do any indications of anxiety, or even concern, manifest themselves in the record.

From the foregoing, it is eminently clear that the Supreme Court of New Jersey did nothing improper in weighing each of the *Barker* v. *Wingo* factors. To the contrary, the court balanced all the relevant criteria to rectify the disequilibrium created by the intermediate appellate tribunal. All that petitioner contends is that the Court established a demand waiver rule and failed to account properly "inherent prejudice to an accused." Yet, respondent's exposition of the decision demonstrates that the court did not establish such a rule but engaged in the sensitive balancing demanded by *Barker*.

Further, where a lengthy delay is caused by prosecutional inadvertence, but where a defendant fails to assert his rights and suffers no prejudice, courts generally have held that no speedy trial violation has occurred under *Barker* v. *Wingo, E.g., United States* v. *Lockett,* 526 F.2d 1110, 1111-12 (7th Cir. 1975); *United States* v. *Fairchild,* 526 F.2d 185, 187 (7th Cir. 1975), *cert.* den. —— U.S. ——, 96 S. Ct. 1682 (1976) (20-month delay between arrest

and indictment); *United States* v. *Toy,* 482 F.2d 741 (D.C. Cir. 1973); *Arrant* v. *Wainwright,* 468 F.2d 677 (5th Cir. 1972); *McIntyre* v. *State,* 17 Md. App. 526, 302 A.2d 672 (Ct. Spec. App. 1973); *State* v. *Morris,* 501 S.W.2d 39 (Mo. Sup. Ct. 1973); *People* v. *Artonio,* 42 A.D.2d 716, 345 N.Y.S.2d 670 (1973); *State* v. *Lisk,* 25 N.C. App. 659, 214 S.E.2d 315 (Ct. App. 1975); *Commonwealth* v. *Pearson,* 450 Pa. 467, 303 A.2d 481 (1973). But see *People* v. *White,* 32 N.Y.2d 343, 345 N.Y.S.2d 513, 298 N.E.2d 659 (1973) (52-month delay too long). Consequently, the Supreme Court of New Jersey merely joined a consensus when it decided the instant case.[2]

Moreover, it is evident that petitioner's position, if advanced to its logical conclusion, would establish a *per se* dismissal rule where delay has been caused by prosecutorial negligence or inadvertence. Such would be totally contrary to this Court's directions in *Barker* v. *Wingo.* A grant of *certiorari* and subsequent decision could only serve to disorder settled legal principles which have recently been reaffirmed. See, *e.g., Dillingham* v. *United States, supra; Moore* v. *Arizona,* 414 U.S. 25 (1973); *Strunk* v. *United States,* 412 U.S. 434 (1973).

In view of the foregoing, respondent submits that *certiorari* should not be granted. Petitioner has failed to demonstrate any constitutional infirmity in the opinion of the Supreme Court of New Jersey which requires review

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[2] Respondent assumes *arguendo* that by "inherent prejudice" petitioner would engage this Court's statement that "even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety suspicion and often hostility." *Barker* v. *Wingo, supra,* 407 U.S. at 533. Petitioner has failed to disclose whether or not he experienced such "inherent prejudice"; and if he did, his failure to mention it must evidence its minimal effect on his life.

in the interest of justice. Likewise, petition has failed to present any substantial federal question. Therefore, there is no merit to petitioner's request for review. See, *e.g.*, *Davis* v. *Ward,* 400 U.S. 1203 (1970); *Panama Canal* v. *Grace Lines, Inc.,* 353 U.S. 368 (1957).

CONCLUSION

For the reasons herein, it is respectfully urged that the Writ of Certiorari should be denied.

Respectfully submitted,

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